



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060

REPLY TO
ATTENTION OF:

JALS-TD

1 April 2014

MEMORANDUM FOR All Trial Defense Counsel

SUBJECT: TDS Policy Memorandum 2014-01: Detailing of Defense Counsel and Formation of Attorney-Client Relationships With Alleged Victims of Sexual Offenses

1. Purpose. This memorandum establishes policies and procedures for members of the Trial Defense Service (TDS) to follow when an alleged victim of a sex offense or his or her Special Victim Counsel (SVC) on his or her behalf requests trial defense representation. This memorandum will be coordinated with interested personnel outside of the TDS to promote understanding of, and compliance with, TDS policies and procedures.
2. Alleged Victim's Entitlement to TDS Representation. In many sexual assault cases, the alleged victim has criminal exposure for collateral misconduct of a relatively minor nature, like underage drinking, adultery, or violation of a barracks policy. The alleged victim is entitled to a SVC, however, the SVC will not provide advice to the alleged victim on potential criminal liability. The SVC or the alleged victim may contact the local TDS field office seeking TDS representation. Having attorneys in the same field office represent both the alleged victim and the accused in the same sex offense case raises several concerns.
3. Avoidance of Conflicts of Interest and Inadvertent Disclosures of Client Confidences.
 - a. All supervisory attorneys in the TDS have a duty to create conditions for the ethical practice of law. Having TDS attorneys from the same field office represent both the accused and the alleged victim in the same case raises a possibility of inadvertent disclosure of confidential information and conflicts-of-interest. To avoid these ethical problems, it is the policy of the TDS that the alleged victim and the accused in the same sex offense case will not be represented by attorneys assigned to the same TDS field or branch office.
 - b. TDS attorneys frequently consult one another when preparing for trial. These discussions between peers are an invaluable strength of the TDS and is a primary way more experienced counsel give advice to less experienced counsel. In addition, TDS counsel consult members of the TDS technical chain and the Defense Counsel Assistance Program (DCAP) for advice. All of these discussions are protected by Rule 1.6 as client confidences. Often, these conversations are informal and take place in hallways or in offices with doors open. With the exception of cases where there are multiple defendants, these informal conversations are permissible and everyone in the field office can participate. The avoidance of inadvertent disclosures in multiple accused situations is manageable because, normally, each defense counsel is aware of who represents the co-accuseds. However, we cannot take for granted that the alleged victim in an active sex offense case will want the fact that she is represented by a TDS counsel generally

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known. The fact that Attorney A represents Client B is a piece of information related to the representation of B and is protected under Rule 1.6. This fact cannot be disclosed without B's consent or one of the other exceptions to the confidentiality requirement listed in Rule 1.6 apply. This puts the counsel detailed to represent the accused, the counsel detailed to represent the alleged victim, and the detailing authority in a difficult position.

c. Not only is the fact that Attorney A represents Client B a client confidence that must be protected by A, it is a confidential fact that must be protected by the detailing authority. The Scope of the ABA Model Rules makes clear that most of the duties flowing from the attorney-client relationship attach only after the client has requested the lawyer to render legal services and the attorney has agreed to do so. However, some duties, including confidentiality, attach when the lawyer agrees *to consider* whether an attorney-client relationship will be established. In the unique circumstances of the TDS field office, the consideration of whether an attorney-client relationship will be established begins with the detailing authority receiving a request to detail a defense counsel to represent the client. As a matter of TDS policy, detailing authorities will keep confidential the fact that Client B has requested representation and that the detailing authority has detailed Attorney A to represent Client B where B is an alleged victim of a sexual assault.

d. The requirement that detailing authorities keep confidential the fact that an alleged victim requested or has TDS representation may potentially lead to a conflict-of-interest. If this fact must be kept confidential based on the attorney-client relationship between the alleged victim and her detailed defense counsel, the detailing authority's duties to other clients may conflict. For example, if the detailing authority personally represents the accused, it would be impossible to maintain the duty to the alleged victim and use the information to represent zealously the person she has accused. Even if the detailing authority is acting as mentor and coach of the counsel who represents the accused (which creates duties with respect to the accused), he can still be put in a position where he cannot both keep the alleged victim's confidence and give unqualified advice to the attorney representing the accused. To avoid this potential conflict, no detailing authority in TDS will detail counsel to represent a Soldier accused of a sex offense and the alleged victim in the same case.

4. Mechanics of Detailing Counsel to Represent Alleged Victim.

a. TDS policy is that the detailing authority located at the installation where the accused is assigned will detail a defense counsel to represent the accused. TDS policy is that a different detailing authority at a different installation will detail a defense counsel from a different installation to represent the alleged victim. Enclosure 1 lists all Army installations that have TDS counsel. Enclosure 1 pairs each installation with another installation. Each SDC will

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proactively coordinate with the SVC(s) on the installation and ensure the SVC(s) understand the policy and the requirement to seek TDS representation directly from the TDS field office at the installation that is matched to the installation where the accused is assigned. SDCs will develop a system for screening their calls so they avoid speaking directly with an alleged victim seeking TDS representation or an SVC. The intent is to ensure that SDCs are not conflicted from representing, or supervising counsel representing, a client accused of a crime.

b. These policies apply to all normal cases. A normal case is a case where neither the accused nor the alleged victim has been reassigned to another installation as a result of the allegation. A normal case is a case where the accused is facing a court-martial (a Priority I duty of TDS counsel) and the alleged victim's criminal liability is likely to result in no action or an action no more severe than nonjudicial punishment or administrative separation (Priority II duties of TDS counsel). A normal case is a case where the accused will be represented by a TDS counsel at the same installation to which the accused is assigned. If, for example, a Fort Hood Soldier accuses another Fort Hood Soldier of rape and the alleged victim is reassigned to Fort Sill, it would make more sense for the alleged victim to be represented by a TDS attorney at Fort Sill and not Fort Sam Houston (the installation paired with Fort Hood in Enclosure 1). Similarly, for example, if an accused from Fort Hood is represented by a defense counsel from Fort Sam Houston, it is possible that the alleged victim from Fort Hood could be represented by a conflict-free defense counsel at Fort Hood. These are only examples, and there may be other exceptional cases. All requests to deviate from this policy and the representational scheme in Enclosure 1 will be directed to the TDS Operations Officer. The important thing is that we prevent situations where client confidences can be inadvertently disclosed to adverse parties and conflicts-of-interests can arise.

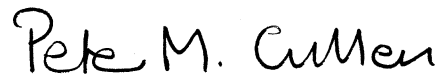
5. TDS Supervisory Responsibilities. TDS must manage conflicts-of-interest all levels of the organization. The result of this policy is that a counsel detailed to represent a Soldier accused of a sex offense can go to his/her SDC for guidance and advice. Similarly, Regional Defense Counsel (RDC) will be kept conflict-free so he or she can provide guidance and advice to a subordinate representing a client accused of a sex offense. RDCs will not detail counsel to represent alleged victims seeking TDS representation. RDCs will not be contacted by anyone seeking representation for an alleged victim of a sex offense. Similarly, members of DCAP will be kept conflict-free so they can provide advice to defense counsel representing clients facing sex offense accusations in a court-martial. A defense counsel defending a court-martial client accused of a sex offense will have all of the usual resources available to defense counsel defending court-martial clients in other types of cases. A defense counsel representing an alleged victim of a sex offense will receive guidance and assistance from his or her SDC and the TDS Operations Officer.

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6. Both the Soldiers accused of sexual offenses and the alleged victims of sexual offenses who seek TDS representation are clients of the TDS. All clients of TDS will receive zealous representation. Zealous representation of both the Soldier accused of a sex offense and the alleged victim of the sex offense will be accomplished while creating conditions that minimize the possibility of a violation of our Rules of Professional Responsibility.

7. Defense counsel will use DCAP Form 7h (Enclosure 2) to explain the scope of representation to alleged victims of sexual offenses. Defense counsel are authorized to form and maintain attorney-client relationships with alleged victims of sexual offenses consistent with DCAP Form 7h. The scope of representation is not limited to the scope of representation for Soldiers seen for a military justice consultation, even if the alleged victim of a sexual offense is not facing an adverse action at the time the relationship commences. DCAP Form 7h is comprehensive because often the defense counsel will not know what action, if any, the command will take. Defense counsel must be very careful to explain the scope of representation in a way that does not upset the client.



PETER M. CULLEN
COL, JA
Chief, Trial Defense Service

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